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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 DAVID GANEK,

4 Plaintiff,

New York, N.Y.

5 v.

15 Civ. 1446 (WHP)

6 DAVID LEIBOWITZ,

7 Defendant.

8 -----x

9 June 22, 2015

11:03 a.m.

10 Before:

11 HON. WILLIAM H. PAULEY III,

12 District Judge

13 APPEARANCES

14 NEUFELD SCHECK & BRUSTIN, LLP

15 Attorneys for Plaintiff

16 BY: NANCY GERTNER

ANNA BENVENUTTI HOFFMANN

NICK J. BRUSTIN

17 BARRY SCHECK

FARHANG HEYDARI

18 PREET BHARARA

19 United States Attorney for the

Southern District of New York

20 Attorney for defendants

21 BY: ANDREW E. KRAUSE

SARAH SHEIVE NORMAND

Assistant United States Attorneys

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1 THE CLERK: Matter on for initial conference and
2 premotion conference, Ganek v. Leibowitz.

3 Will counsel for the plaintiff please state their
4 appearances for the record.

5 MS. GERTNER: Nancy Gertner for David Ganek.

6 MS. HOFFMANN: Anna Benvenutti Hoffmann also for
7 plaintiff David Ganek.

8 MR. BRUSTIN: Nick Brustin also for plaintiff Ganek.

9 MR. SCHECK: Barry Scheck for David Ganek.

10 MR. HEYDARI: Farhang Heydari also for the plaintiff.

11 THE COURT: Good morning.

12 THE CLERK: Counsel for defendants.

13 MR. KRAUSE: Good morning, your Honor. Andrew Krause
14 for all 15 defendants.

15 MS. NORMAND: And Sarah Normand, your Honor, also for
16 the defendants.

17 THE COURT: All right. Good morning to you, too.

18 Now, this is an initial conference and a premotion
19 conference.

20 Ms. Gertner, would you briefly describe the nature of
21 the claims at this juncture?

22 MS. GERTNER: I sure will.

23 Your Honor, this is a very straightforward claim
24 notwithstanding the government's letter. The allegation is
25 that there was a search warrant affidavit in which there was a

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1 material misrepresentation to search. The search warrant
2 quoted a cooperator named Adondakis as having implicated
3 Mr. Ganek in insider trading, that he both got insider
4 information and that he knew the information was inside
5 information.

6 Fast-forward to a year and a half later. There is
7 testimony at trial. At the trial -- Mr. Ganek is never
8 charged, never indicted. Fast-forward to the trial. A year
9 and a half later, two witnesses, an FBI agent and a U.S.
10 attorney who was present at the meeting at which Adondakis was
11 debriefed, stated categorically, and testified under oath, that
12 Mr. Adondakis had never implicated Mr. Ganek in insider trading
13 with respect to any company at any time.

14 So it is an unusual situation. It's not the -- it's
15 not the kind of situation where there is a misrepresentation in
16 a warrant where later on someone says A and then someone says
17 not A. This is a situation in which there was never a moment
18 when Mr. Adondakis implicated Mr. Ganek in insider trading at
19 all.

20 Significantly, Mr. Adondakis testified at the
21 subsequent trial, as did the Agent Makol, who is the FBI agent,
22 I'm sorry, who testified.

23 So we are alleging Fourth Amendment violation with
24 respect to material misrepresentation in the warrant. We are
25 alleging a Fifth Amendment violation with respect to due

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1 process, and other claims.

2 The defendants are not just the drafter of the warrant
3 and the individuals who are participating in the meeting at
4 which Adondakis was debriefed, the defendants are supervisors
5 as well as the U.S. Attorney, based on investigation that we
6 did as to the high profile nature of this case, the kinds of
7 information that was released to the public, decisions made
8 about treating this as a search warrant rather than a subpoena,
9 decisions made with respect to leaking information to the Wall
10 Street Journal. So we allege it's not just the individual who
11 signed the warrant, which was a material misrepresentation,
12 it's not just those who were present at the meeting with
13 Adondakis, but, in fact, there were supervisors who were
14 intimately involved in the decisions that were made up the
15 line. And that's really the core of the case and that's the
16 basis for the suit.

17 THE COURT: All right. Thank you, Ms. Gertner.

18 Now, Mr. Krause, the government has submitted a
19 premotion letter seeking to move to dismiss. Does the
20 government first intend to move with respect to all of the
21 defendants?

22 MR. KRAUSE: Yes, we do, your Honor, and we intend to
23 move on behalf of all 15 defendants.

24 THE COURT: And, briefly, do you want to be heard with
25 respect to that proposed motion? In your letter, you said that

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1 there would be some other arguments that you would be advancing
2 with respect to the plaintiff's due process claim. I would
3 like you to at least elaborate on that a little, if you can.

4 MR. KRAUSE: Yes, your Honor. We are still in the
5 process of researching and developing those arguments, but with
6 respect to the Fifth Amendment arguments, we do believe that in
7 significant part they collapse into the Fourth Amendment
8 arguments in that they are predicated on this notion of
9 fabrication of evidence, which we believe is inadequately pled
10 for a variety of reasons, as we set forth in the letter. Among
11 those reasons, as we've discussed in the letter, is that the
12 evidence proffered in the complaint as a basis for the
13 purported fabrication all relates to testimony that was given
14 just -- I believe Ms. Gertner may have inadvertently misspoken.
15 No A.U.S.A. has testified at the trial.

16 MS. GERTNER: Right.

17 MR. KRAUSE: But Mr. Adondakis and Agent Makol, they
18 testified with respect to alleged misrepresentations with
19 respect to a particular stock, Dell Incorporated, which was a
20 major source of discussion at the trial in question. But the
21 search warrant affidavit doesn't refer to specific information
22 being provided to Mr. Ganek about Dell; it refers to inside
23 information more generally. That's plain on the face of the
24 warrant.

25 So, your Honor, that's essentially our position with

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1 respect to the Fifth Amendment claim. There is no due process
2 violation if there is no fabrication of evidence underlying the
3 process that was performed to obtain the search warrant. It
4 was a standard search warrant application. The affidavit was
5 reviewed and accepted. And absent any impropriety with respect
6 to the warrant, we believe there is no due process violation at
7 all.

8 THE COURT: Don't some of those issues just turn on
9 the facts, though?

10 MR. KRAUSE: Your Honor, we believe that, in fact,
11 based on the documents that are relied upon in great detail in
12 the complaint -- the warrant affidavit itself, the testimony
13 that is cited, additional testimony from Agent Makol -- make
14 clear that there are contemporaneous notes of the
15 November 2nd meeting in question at which the agent who took
16 those notes clearly wrote that Mr. Ganek had this information,
17 that the allegation is that he purportedly did not have. We
18 believe that both from the perspective of a failure to state a
19 claim and from a qualified immunity perspective, that
20 information alone makes clear that reasonable agents could have
21 differed with respect to the understanding of what was and was
22 not said at that meeting, that that renders the allegations in
23 the complaint implausible, because those notes which are
24 discussed and the testimony which is expressly relied upon in
25 the complaint provide a reasonable alternative explanation to

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1 the alleged fabrication.

2 THE COURT: But doesn't that turn directly on the
3 credibility of the affiant and those who testified at the
4 trial?

5 MR. KRAUSE: Your Honor, we believe that even if you
6 accept as true all of the allegations, including the testimony
7 at the trial, the complaint doesn't address this issue with
8 respect to the notes at all, which, again, is made clear in the
9 same testimony from the same witness, the same defendant, that
10 is relied upon in the complaint.

11 THE COURT: Right. But the note taker was only
12 purportedly taking down what he or she heard Adondakis say.
13 Didn't Adondakis deny ever saying it?

14 MR. KRAUSE: I think there may be some -- there may be
15 some confusion as to which --

16 THE COURT: Well, "confusion" is a word the government
17 has used both at trial and in submissions, haven't you?

18 MR. KRAUSE: I'm sorry, your Honor. I'm not sure I
19 understand the question.

20 THE COURT: Hasn't the government used the word
21 "confusion" to describe what was in the affidavit?

22 MR. KRAUSE: I believe that that is a word that Agent
23 Makol may have used during his testimony. But, your Honor, we
24 believe that that does provide a basis for a qualified immunity
25 argument, that there was a reasonable officer who understood

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1 what was said in one particular way and perhaps there was a
2 reasonable office who understood it in a different way.

3 THE COURT: Now, what about discovery in this case
4 during pendency of the motion? I guess, first, when are you
5 prepared to file your motion?

6 MR. KRAUSE: Your Honor, given some scheduling issues
7 for both myself and Ms. Norman and the need to consult with all
8 15 of our clients, we would like six weeks in order to be able
9 to file the motion.

10 THE COURT: All right. You know, the plaintiffs, in
11 seeking to conduct some discovery, argue that certain discovery
12 inevitable. I think that's the word, Ms. Gertner, that's used
13 in the 26(f). What discovery is inevitable in this case?

14 MS. GERTNER: Are you asking me?

15 THE COURT: Yes, or any of your colleagues.

16 MS. GERTNER: Well, at the very minimum, the 302,
17 which are the notes or the embodiment of the notes that counsel
18 is referring to, was referred to in the subsequent trial of
19 Mr. Chiasson and Mr. Newman, we would like that as part of -- I
20 won't label that discovery; I would label that as part of the
21 initial disclosures, the 302s. And then there would be any
22 supporting notes, as well, to the 302s. Because, as I said,
23 the platform that this case is built on is what was said in the
24 affidavit, what was said in the 302 and the supporting notes
25 and what was said at the trial.

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1 So that's actually minimal. I believe we would want
2 more broadly, but I can defer to Ms. Hoffmann

3 MS. HOFFMANN: I mean, presumably, document discovery,
4 as Ms. Gertner was saying, we don't think that there is any
5 basis to dismiss against -- certainly against the core
6 defendants because all the defendants are doing is really
7 fighting against the factual allegations in our complaint, and
8 that obviously can't happen at a motion to dismiss stage.
9 Assuming that discovery is going to go forward at least against
10 those defendants, initial document disclosures, things that
11 could be made at this early stage. So certainly the 302 and
12 the underlying notes, potentially other documents that were
13 disclosed to the criminal counsel in the Chiasson and Newman
14 case for which there couldn't possibly be any claim of
15 privilege, those kinds of documents, those sort of
16 uncontroversial document disclosures could go forward at this
17 early stage.

18 MS. GERTNER: I just want to add one thing. We
19 understand that the government is filing this letter and, we
20 believe, without having talked to all 15 defendants and, in
21 part, because of the conflict issue that that raises, so that
22 creates an ambiguity to the representations being made here. I
23 just want to note that for the record.

24 THE COURT: Well, I don't know how you could know
25 whether the Assistant U.S. Attorneys on the case have conferred

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1 with each of their 15 clients.

2 MS. GERTNER: It is a representation they made to us,
3 your Honor.

4 MR. KRAUSE: Your Honor, if I may just correct the
5 record on that a little bit? It is a representation that we
6 made in early discussions with counsel prior to our having
7 authority to represent those individuals defendants.

8 So there came a point in time when the Department of
9 Justice, through its administrative process, approved the
10 representation request that had been made by the 15 individual
11 defendants. Prior to that time, we did have discussions with
12 plaintiff's counsel about various matters and we did make that
13 representation, which was true at that time.

14 But we have represented those defendants now for
15 approximately a month, maybe a little bit more than that, and
16 so I don't want to get into the discussions we had and haven't
17 had with our clients but I think that there is just perhaps a
18 timing disconnect there.

19 THE COURT: But is there the possibility that there is
20 going to be a conflict looming if this case proceeds beyond the
21 motion to dismiss?

22 MR. KRAUSE: Your Honor, at this time we have no basis
23 to believe that there is a material conflict with respect to
24 our representation of the defendants. Of course, if during the
25 course of that representation we learn of any potential

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1 conflict, we would immediately, in accordance with our own
2 ethical responsibilities and the Department's guidelines with
3 respect to representation of individual defendants, take the
4 appropriate steps.

5 MR. BRUSTIN: Your Honor, the reason we didn't raise
6 the conflict issue at this point is because it was our
7 understanding that they hadn't spoken to individual defendants,
8 that they were simply making -- trying to be making motions on
9 procedural and legal grounds. Now that we understand they may
10 have spoken to the defendants, we may have to raise the
11 conflict issue, because we think there are many conflicts that
12 could arise here. The allegations we're raising raise both
13 potentially criminal conduct as well as ethical conduct for the
14 attorneys. There is no question that some may not be
15 indemnified. There is putative damages. There are a host of
16 conflicts that will arise here that eventually we believe the
17 Court will have to deal with, and we believe it is our
18 obligation under Dunton to raise them with the Court to protect
19 any verdict that we obtain.

20 THE COURT: All right. The question, though is they
21 may loom a little later in this litigation, assuming that for
22 the moment that the government's not successful with respect to
23 all of the defendants on its motion to dismiss, and the
24 question at the moment is whether there is a conflict inherent
25 now on a motion directed at qualified immunity. That's why I'm

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1 raising it.

2 MR. BRUSTIN: Our concern -- and we hadn't thought
3 this through because we didn't realize this was happening -- is
4 that one group of lawyers from the government is speaking to
5 all the defendants substantively about the case. That could be
6 a problem going forward. And we haven't thought that through,
7 but we would like to do the research and think about it,
8 because we don't want to do anything to jeopardize our rights
9 going forward. And so we have an obligation to raise the
10 conflict as soon as we see it.

11 Our understanding was they weren't speaking to them
12 substantively about the case. Now it sounds differently.

13 THE COURT: Mr. Krause.

14 MR. KRAUSE: Your Honor, if I may? The Department of
15 Justice has a process for evaluating and in this case approving
16 representation requests, including in cases involving multiple
17 defendants. It's something that happens with some regularity.

18 In this case all 15 individual defendants have the
19 option to seek representation through the Department of
20 Justice. It was not forced upon them in any way. It was not
21 mandated in any way. Many -- in fact, a significant number of
22 these individual defendants -- are former employees. And the
23 Department of Justice reviewed those applications, considered
24 the various issues that needed to be considered, and approved
25 the representation requests.

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1 Of course, Ms. Normand and I are both aware of the
2 potential for conflict, as we would be in any case involving
3 multiple representations of individual defendants, and to the
4 extent those issues require further consultation internally
5 within our office or with the Court, we would certainly raise
6 those issues promptly.

7 THE COURT: All right. Well, obviously there's a lot
8 of well settled case law in this circuit, starting with Dunton,
9 about potential conflicts and the need for counsel to represent
10 divergent interests. Even when a government in that case -- I
11 think it was Suffolk County -- decided to provide
12 representation, they had an obligation to provide conflict-free
13 representation. And that may well be an issue that needs to be
14 vetted early on in the case. I mean, I'm going to fix a motion
15 schedule.

16 But getting back, I guess, to the question of
17 discovery pending this motion. First, for the plaintiff, what
18 prejudice is there to Mr. Ganek if the Court were to stay
19 discovery while the motion to dismiss is pending?

20 MS. GERTNER: I know that question well, your Honor.
21 The only answer that we have is that the case will proceed
22 against someone -- the drafter of the false affidavit, those
23 who knew of it -- and the discovery that we request -- and
24 without waiving our other issues, so it's only a question of
25 when we get the discovery. The delay is the delay in

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1 litigating this case. I can't say there is anything more
2 substantial than that.

3 But, likewise, there's no burden on the government
4 because it will proceed against someone, and the information
5 we're requesting is not information they have to cull or
6 manage, it is information already out there. And at the very
7 minimum, it seems to me that that's information that they
8 should provide.

9 MR. KRAUSE: Your Honor, of course we strenuously
10 disagree that the case will definitely proceed against anybody,
11 and that is the basis of our resistance to proceeding with any
12 discovery at this point. However, if there are specific
13 documents on which the complaint appears to explicitly rely, we
14 can provide those documents to plaintiff's counsel. I believe
15 they have those documents already through whatever means. But
16 to the extent there are specific documents that are addressed
17 in the complaint directly, we can provide those documents, to
18 the extent that they don't have any of those.

19 THE COURT: What about the 302s relating to the
20 meetings, in particular, I guess the November 2 meeting with
21 Mr. Adondakis?

22 MR. KRAUSE: Right. In this case it must be a 1023,
23 but it is the same basic idea. Your Honor, I can't represent
24 at this point whether or not there might be issues of privilege
25 or other concerns with respect to those documents. It's

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1 something we can take under advisement and consider.

2 I know for a fact that there is a protective order in
3 place in the criminal case which is still, I believe, effective
4 and would cover all of the material that was provided to
5 defense counsel in that matter. It may be that it terminated
6 upon conclusion of the criminal case. I haven't looked at the
7 protective order in a little while, but that's something we
8 would certainly have to go back to at a threshold level before
9 we also consider whatever other potential privileges there
10 might, whether there might be other ongoing investigations that
11 are addressed in those documents. That's just something we
12 have to think through.

13 THE COURT: Well, wasn't there an application either
14 just before or at the time this case was filed to the Part I
15 judge to unseal the affidavit in support of the search warrant,
16 and wasn't that granted?

17 MR. KRAUSE: The affidavit itself, yes, and it was
18 granted with redactions. The government had proposed certain
19 redactions to those documents. That was handled by our
20 colleagues in the Criminal Division, and the application was
21 unsealed but with redactions precisely because of some of these
22 concerns, I believe.

23 THE COURT: All right. Well, I think that at least
24 during the pendency of this motion, that you should confer with
25 your colleagues in the Criminal Division and determine whether

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1 the 302s can be provided to plaintiff's counsel. I would be
2 certainly inclined, without having the issue fully presented
3 yet to me, to think that there is not any real good argument
4 why the plaintiffs shouldn't have those materials.

5 It seems to me that there could be some initial
6 disclosures made along those narrow kinds of lines that I'm
7 going to leave for counsel to have a separate discussion and
8 negotiation about, and if you can't reach an agreement, you can
9 submit a letter application to me. But, you know, the notion
10 with respect to qualified immunity that -- and I don't by this
11 mean to suggest that I'm accepting plaintiff's argument that
12 there's going to be somebody in the case, but even so,
13 qualified immunity is aimed at protecting defendants who
14 otherwise are not going to be part of the case from having to
15 in any way defend the case or provide discovery in the case or
16 participate in proceedings in the case, and I simply want
17 everyone to remain mindful of that.

18 And so I'm prepared to tee up this motion. At the
19 same time, if counsel believe that there's a conflict issue
20 that needs to be vetted, you can submit something to me on your
21 own schedule; I'm not going to schedule that.

22 But, Mr. Krause, you requested approximately 60 days?

23 MR. KRAUSE: I requested six weeks, your Honor.

24 THE COURT: Six weeks?

25 MR. KRAUSE: But we certainly will take 60 days, if

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1 your Honor doesn't mind.

2 THE COURT: How about August 5?

3 MR. KRAUSE: Thank you, your Honor.

4 THE COURT: All right. How much time would the
5 plaintiffs like to oppose the motion?

6 MS. HOFFMANN: I think, given our vacation and other
7 work schedules, we would request eight weeks, so towards the
8 end of September.

9 THE COURT: All right. What I'm going to do,
10 Mr. Krause, take until August 14th. All right?

11 MR. KRAUSE: Thank you, your Honor.

12 THE COURT: And how about October 7 for opposition?

13 MS. HOFFMANN: That is fine. Thank you.

14 THE COURT: How much time would you like for reply?

15 MR. KRAUSE: Your Honor, if I may respectfully request
16 30 days? I know that is a long time for a reply, but I expect
17 to be on paternity leave on August 7th. So we if we could just
18 have a little bit of extra leeway so that I might get back and
19 continue to work on the reply, I would appreciate it.

20 THE COURT: November 4 for reply.

21 MR. KRAUSE: Thank you very much, your Honor.

22 THE COURT: And I'm going to put the case down for an
23 oral argument on November 20th at 11 o'clock.

24 Is there anything further the parties would like to
25 raise this morning?

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1 MS. GERTNER: No, your Honor.

2 MR. KRAUSE: Your Honor, there is one thing that
3 occurs to me with the briefing. Especially given the number of
4 defendants, I expect that we would need more than 25 pages. If
5 we could have 40 pages in our opening brief?

6 THE COURT: All right, but take the time to try to
7 make it shorter.

8 MR. KRAUSE: We'll do our very best, your Honor.

9 THE COURT: All right. What about -- I assume the
10 plaintiffs want to invoke the goose/gander rule, so I'll allow
11 it. There are some fascinating issues here. But take the time
12 to make it shorter.

13 MR. KRAUSE: Understood.

14 THE COURT: All right. And no more than 15 pages on
15 reply.

16 All right. Thank you very much.

17 MS. GERTNER: Thank you.

18 MR. BRUSTIN: Thank you, your Honor.

19 MR. KRAUSE: Thank you, your Honor.

20 THE COURT: Have a good afternoon.

21 THE CLERK: All rise.

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25